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In the

Supreme Court of the United States

No. 80, October Term 1942.

THE CHOCTAW NATION OF INDIANS,
Petitioner,

VERSUS

THE UNITED STATES AND THE CHICKASAW NATION.

ON PETITION OF THE CHOCTAW NATION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF OF THE RESPONDENT, THE CHICKASAW NATION IN OPPOSITION TO "MEMORANDUM FOR THE UNITED STATES."

MELVEN CORNISH,
Special Attorney, Chickasaw Nation.

SUBJECT INDEX.

PAGE

ARGUMENT

AUTHORITIES.

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The respondent, the Chickasaw Nation, has heretofore filed its "BRIEF FOR RESPONDENT, THE CHICKASAW NATION, IN OPPOSITION" to the petition and brief of the petitioner, the Choctaw Nation.

The respondent, the Chickasaw Nation has now been served with a copy of the "MEMORANDUM FOR THE UNITED STATES"; and this is its brief in opposition to the same.

No Rule is found governing the filing of such memorandum briefs, but no objection is here made to the filing of the same by the United States; and it is assumed that there will be no objection to the filing of a brief in opposition thereto by the respondent, the Chickasaw Nation; and that the same will be considered by this Honorable Court, along with the other briefs which relate to the pending petition of the Choctaw Nation for Writ of Certiorari to the Court of Claims.

ARGUMENT.

(1)

The Court will continue its inquiry into those alleged errors which appear from the face of the Record (Record, 1-28); and since such Record contains no reference to Article XXVI of the Treaty of 1866, and since the only information regarding the same is contained in the petition and brief of the Choctaw Nation, and the "Memorandum for the United States", the same is not properly before the Court, in the instant proceeding.

On pages 6 and 7 of such "MEMORANDUM FOR THE UNITED STATES" it is said:

> "Since these tribes already held their lands in fee, the patents subsequently issued to the Choctaw freedmen were executed by the principal chiefs of the Choctaw and Chickasaw Nations and not by the President of the United States. Hence, if any lands were allotted without the unconditional consent of the Chickasaw Nation, giving rise to a right in the Nation to be compensated, it seems clear that the Choctaw Nation has the primary duty to pay compensation." (Citing authorities.)

This is a fair statement of what transpired, as shown by the Record, in the suit decided on December 1; 1941, by the Court of Claims below.

But in paragraph 2 of the "Discussion" (pages 7-9) in the "MEMORANDUM FOR THE UNITED STATES", a contention is raised and made by the United States that, as we respectfully contend, may not be raised and made in the instant proceeding; and that the inquiry here, as to whether the petition for Writ of Certiorari to the Court of Claims shall be granted or denied, will be confined to an *examination of the "Transcript of Record"*, to ascertain if

such errors have been committed by the Court of Claims as will warrant a review by this Honorable Court.

Section 3 (b) of the Act of February 13, 1925 (43 Stat., 936), and also paragraph 4 of Rule 41, would seem to govern the procedure in petitions for Writs of Certiorari to the Court of Claims.

Section 4 of Rule 41, prescribed in pursuance of that Act, provides that,

> "A petition to the court for a writ of certiorari to review a judgment of the Court of Claims shall be accompanied by a transcript of the record in that court, consisting of the *pleadings, findings of fact, judgment and opinion of the court, but not the evidence.*" (Italics ours.)

The Rule then provides that the petition shall "contain a summary and short statement of the matters involved", and that a supporting brief may be annexed to the petition or presented separately; and it also provides for a brief in opposition by the respondent,

Will it be contended that the petition and briefs filed by authority of that Rule, must not strictly conform to what "Transcript of Record" shows in the selection of the alleged errors which are sought to be reviewed?

The respondent, the Chickasaw Nation, respectfully contends that the whole question here is: Is the petitioner (and the United States), confined to the presentation of alleged errors committed by the Court of Claims *which appear in the record*, as defined by the law and the Rules; or may they, by mere unsupported allegations in petition and briefs, go beyond, and outside of, the record, and present any other alleged errors of which they may see fit to complain; and

thus revive, and again have retried and passed upon, any and all contentions which might have been presented and argued in the Court of Claims below, and which do not appear in the record?

The only alleged error of which the United States complains (in its "MEMORANDUM FOR THE UNITED STATES", pages 7-9), is that the Court of Claims failed to hold that Article XXVI of the Treaty of 1866 (14 Stat., 769) conferred upon the Choctaw Freedmen the right to receive 40 acre allotments; whereas, an examination of the "Transcript of Record" (pages 1-28) will show that it contains *no reference whatever* to said Article XXVI of the Treaty of 1866.

It may be a fact (and the briefs filed in the Court of Claims below show it to be a fact), that such a contention was made in the Court of Claims below; but when the Court of Claims came to decide the case ("Special Findings of Fact", "Conclusions of Law" and "Opinion"; Transcript of Record, pages 13-28), it, apparently, concluded that any contentions regarding Article XXVI were not well taken, and without merit; and the "Transcript of Record" filed herein (and which, as the respondent, the Chickasaw Nation contends, must govern what alleged errors are reviewable in the instant proceeding), contains no reference whatsoever, to Article XXVI of the Treaty of 1866, or to any contentions regarding the same that might have been made in the Court of Claims below.

How may this Honorable Court know that this alleged error is one which may, or may not, be considered and passed upon in the instant proceeding?

The answer is: by an examination of the "Transcript of Record"; and there is nothing in the record filed herein

to show that Article XXVI was ever considered and passed upon by the Court of Claims; and this Court is asked to consider and pass upon such alleged error *solely and wholly upon the allegations contained in the petition and brief of the petitioner, the Choctaw Nation and the brief of the United States.*

It is interesting to note that the *sole and only alleged error* of which the United States complains is that relating to Article XXVI of the Treaty of 1866 (which is nowhere referred to in the "Transcript of Record" filed herein); whereas there is no complaint whatsoever that the Court of Claims committed *other errors* in the numerous issues decided in its opinion and judgment of December 1, 1941 (and which appears in the record; pages 1-28), and of which the United States had the right to complain herein, if it had seen fit to do so.

The contention of the respondent, the Chickasaw Nation, that the inquiry, in the instant proceeding will be confined to what appears in the "Transcript of Record" herein, is supported by authorities.

In Corpus Juris, Vol. 11, page 111, and in paragraph 58, upon the subject of "Certiorari", and under the subtitle of "Matters Not Appearing in the Record", it is said, in the text:

> "The office of the common law writ of certiorari is confined to bringing up the record alone, and any matters dehors the record which are returned therewith should be disregarded" (citing authorities);

and also,

> "For instance, errors committed in the admission of evidence do not appear in the record, and hence are not reviewable * * *." (also citing authorities.)

In the same volume of Corpus Juris, page 199, and in paragraph 355, and under the sub-title of "Review as Confined to Record", it is said, in the text:

> "Except where otherwise provided by statute, or authorized by practice, it is the general rule that, in ascertaining whether or not the inferior court or tribunal had jurisdiction and proceeded regularly in making the determination complained of, the reviewing court is confined to the consideration of the record returned in obedience to the writ by which the error, if any must appear."

Note this language: *"Except where otherwise provided by statute"*, the general rule is that the reviewing court will be *confined to the record* in determining if such errors have been committed as will warrant the allowance of the Writ of Certiorari; and as to decisions of the Court of Claims which are sought to be reviewed, it will not be contended that the Statute (Section 3 of the Act of February 13, 1925; 43 Stat., 936), does not, very definitely and very specifically, limit and define what shall constitute *the record* which shall accompany petitions for writs of certiorari to the Court of Claims.

In support of what is thus said, in the text, the case of *McClellan* v. *Carland* (217 U. S. 268), is cited; and in that case, syllabus 5 is as follows:

> "The Federal Supreme Court will determine a cause brought before it by certiorari to the circuit court of appeals *upon the record made in that court, and certified to the Supreme Court.*"

In the case of *Edward Hines Yellow Pine Trustee* v. *Martin* (268 U. S. 458), it is held:

> "This appears to be the first occasion in the course of this litigation on which the existence of this statute,

and the claim of right under it by the petitioner, have been brought to the attention of the court, *although it appears to have been before the state court, but not commented on,* in *Buckham* v. *Columbia Bank, supra,* and *Hines Yellow Pine Trustee* v. *Martin, supra. It is not referred to in the record here.*

* * * * * * *

"This court is a court of review, and *it will not consider questions not raised or disclosed by the record brought to it for a review* and which were not considered by the courts below." (Italics ours);

and, in support of this holding, the cases of *McClelland* v. *Carland, supra* (217 U. S. 268); *Bass, etc., Ltd.* v. *Tax Commission* (266 U. S. 271); *Davis* v. *Currie* (266 U. S. 182); and *United States Fidelity and Guaranty Company* v. *Woolridge* (268 U. S. 234), are cited.

It is respectfully submitted that no cases could be more decisive of the issue here raised and presented.

In the instant case, Article XXVI may have been presented to, and argued before the Court of Claims; *but the Transcript of Record herein filed contains no reference whatsoever to what might have transpired before the lower court regarding the same;* and the only information which this Honorable Court can have upon that subject and issue consists of the unsupported statement contained in the petition and briefs of the Choctaw Nation, and of the United States.

(2)

Irrespective of the contention of the Respondent, the Chickasaw Nation herein, that Article XXVI of the Treaty of 1866 is not properly before the Court, in the instant proceeding, because the "Transcript of Record" contains no reference to the same, the contentions of the Choctaw Nation, and the United States, that such Article conferred rights upon the Choctaw Freedmen, is without merit.

In its "BRIEF OF RESPONDENT, THE CHICKASAW NATION IN OPPOSITION" to the brief of the petitioner, the Choctaw Nation, the contentions of the Choctaw Nation (pages 6-9) regarding Article XXVI of the Treaty of 1866 have been opposed and answered upon the merits of such contentions, and irrespective of the contention here made that the alleged errors of the Court of Claims below may not be reviewed in the instant proceeding, because the "Transcript of Record" filed herein contains no reference to that subject.

The attention of this Honorable Court is again called to what has therein been set out, merely for the purpose of showing that (even if the contentions regarding Article XXVI of the Treaty of 1866 were properly before this court for review, in the instant proceeding), there is no merit in such contentions.

It has been therein shown:

First, That, in the case of *United States* v. *Choctaw Nation, Chickasaw Nation and Chickasaw Freedmen* (193 U. S., 115-127), it has been held that *no rights whatsoever* were conferred upon the Freedmen by Article 3, Treaty of 1866 (Brief, pages 6-9); and

Second, That Article XXVI of this Treaty of 1866 dealt wholly with the rights of *Choctaws and Chickasaws*

(and had no application to the proposed rights of Freedmen), in the allotment of their own commonly owned lands; whereas, the rights which might have been conferred upon the Freedmen were gauged and measured solely and wholly by Article 3 of that Treaty; and that the contention that Article XXVI of the Treaty of 1866 (which related wholly to the rights of *Choctaws and Chickasaws* in changing the ownership of their commonly owned lands from *common to individual ownership)* could have any application to the proposed rights of Freedmen to receive gifts of 40 acre allotments, is not only without merit, but fantastic.

It may, also, be said that to contend that Article XXVI of the Treaty of 1866, which says that "*the right here given to Choctaws and Chickasaws*" (as a part of a plan to allot and divide their own commonly owned lands into individual shares) could operate to elevate the Freedmen from the limited and conditional right proposed by Article 3 to receive gifts of 40 acre allotments, to the *same ownership status* as *Choctaws and Chickasaws*, is not only fantastic, but shocking.

Following that decision of the Supreme Court in the *Chickasaw Freedmen* case, *supra*, regarding Article 3 of the Treaty of 1866, the Court of Claims then found and held (Brief, page 7), that the Freedmen were *without rights* under that Treaty, as follows (Record, 21):

> "The tribes did not adopt the specified legislation (authorized by Article 3 of the Treaty of 1866), within the two year period, and the United States did not thereafter remove the Freedmen. Hence they remained with the Indians *without defined political status or property rights.*" (Italics ours.)

The Court of Claims then found and held (Record, 21-

22) that, under the Atoka Agreement of June 28, 1898 (30 Stat., 495), it was agreed between the Choctaw Nation and the Chickasaw Nation (and the United States) that the Choctaw Freedmen might be given 40 acre allotments out of the commonly owned lands; and that the Chickasaw Nation was to receive compensation for its common interest in such lands, by a corresponding reduction of the Choctaw citizen allotments.

It also found and held (Record 26) that this guaranty and obligation was reaffirmed by the *proviso* to Section 40 of the "Supplementary Agreement" of July 1, 1902 (32 Stat., 641).

It has also found (Record 20; Finding 13) that the Chickasaw Nation has never received the compensation guaranteed by the Agreement of 1898, and reaffirmed by the Agreement of 1902, by the reduction of Choctaw citizen allotments or otherwise; and that, throughout the intervening years, the Choctaw Nation has admitted its guaranty and obligation, and has attempted to redeem the same, out of the proceeds of the moneys paid by the United States for the lands allotted to the Chickasaw Freedmen (Record 27).

In its decision of December 1, 1941, judgment, in principle, was rendered against the Choctaw Nation, and in favor of the Chickasaw Nation; and, in the instant proceeding, this Honorable Court is called upon to decide if the Court of Claims has committed such errors as will warrant a review of that decision.

CONCLUSION.

In conclusion, it is respectfully contended by the respondent, the Chickasaw Nation:

1. That the contention of the Choctaw Nation, and of the United States (in its "MEMORANDUM FOR THE UNITED STATES"), that the Choctaw Freedmen acquired rights in the common lands of the Choctaws and Chickasaws, under Article XXVI of the Treaty of 1866, is not properly before the Court, in the instant proceeding, because the "Transcript of Record" filed herein does not show that such contention was ever considered and passed upon by the Court of Claims below;

2. That, even if such contention was properly before this Honorable Court, it is without merit; and

3. That, generally, in its decision of December 1, 1941 (Record 13-28), the Court of Claims has not committed such errors as would warrant a review by Writ of Certiorari; and

4. That the petition of the Choctaw Nation for Writ of Certiorari should be denied.

MELVEN CORNISH,
Special Attorney, Chickasaw Nation.